

# **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY, et al.,

Defendants.

CIVIL ACTION NO.  
2:18cv530

EXCERPT TRANSCRIPT OF PROCEEDINGS  
(**Daubert Hearing - Rulings**)

Norfolk, Virginia

December 2, 2022

BEFORE: THE HONORABLE ROBERT J. KRASK  
United States Magistrate Judge

1 Give me just a moment.

2 (Pause in the proceedings.)

3 THE COURT: Norfolk Southern's motion in limine to  
4 exclude evidence and argument that the Belt Line switch rate  
5 is unreasonable is denied subject, of course, to the Court's  
6 ruling on the pending motions for summary judgment.

7 The linchpin of Norfolk Southern's argument is that  
8 the Surface Transportation Board, or STB, has sole  
9 jurisdiction to decide switch rates for Belt Line. As a  
10 result, Norfolk Southern argues that CSX may not ask the  
11 trier of fact to assess the reasonableness of the Belt Line  
12 switch rate, the Court may not remedy that rate, and the  
13 switch rate is irrelevant and beyond the scope of this case.

14 As Chief Judge Davis explained in ruling on the  
15 motion to dismiss with respect to this question of  
16 jurisdiction, I quote the STB's exclusive authority over rail  
17 carriers' mergers implicates the doctrine of, quote, primary  
18 jurisdiction, which, despite its name, is not jurisdictional.

19 Importantly, despite what the term "primary  
20 jurisdiction" may imply, it does not speak to the  
21 jurisdictional power of the federal court; it simply  
22 structures the proceedings as a matter of judicial discretion  
23 so as to engender an orderly and sensible coordination of the  
24 work of agencies and courts. That's ECF 395 at 4, and he  
25 quotes a Fourth Circuit case involving *Environmental*

1     *Technology Council*, 98 F.3d at 789, note 24.

2             Accordingly, the existence of STB authority to  
3     decide whether the Belt Line switch rate is reasonable does  
4     not mean that the Court lacks jurisdiction over CSX's claims.  
5     Such claims are properly before the Court, and in view of the  
6     need to consider, quote, the orderly and sensible  
7     coordination of work of agencies and courts, it is also  
8     noteworthy that the STB has stayed its proceeding pending the  
9     resolution of the case before this Court, with the STB being  
10    fully aware of this current litigation.

11            This leaves the question whether the evidentiary  
12    grounds exist to bar CSX from offering evidence as well as  
13    argument of an alleged excessive switch rate as proof in  
14    support of CSX's pending antitrust conspiracy and contract  
15    claims.

16            As noted by Chief Judge Davis, quote, CSX asserts  
17    that the establishment of such rate in 2009, and the  
18    maintenance of such rate over time, was the product of  
19    unlawful collusion. And that's ECF 395. I'm missing the  
20    page cite, but it's footnote 17.

21            In *Great Northern Railway Company*, the Supreme Court  
22    stated that the determination of a past wrong of, quote, an  
23    unreasonable or discriminatory rate is a judicial function.  
24    And that is at 259 U.S. at 291.

25            Therefore, in the context of addressing CSX's

1 pending claims, the question of whether the switch rate was  
2 excessive and used to block CSX from access to NIT is  
3 squarely a judicial function.

4 Norfolk Southern seeks to bar such evidence on the  
5 ground that only the STB is vested with authority to  
6 determine the reasonableness of the switch rate and that  
7 evidence directed to assessing whether it was excessive is  
8 irrelevant.

9 The jury, however, is not going to be tasked with  
10 adjudicating the proper switch rate. The relevant question  
11 in the context of the pending claims is whether the  
12 defendants conspired and colluded to set the switch rate at  
13 an inflated level so as to unlawfully and effectively  
14 preclude CSX from gaining on-dock rail access to NIT.

15 Evidence tending to establish such facts appears at  
16 this juncture to be of consequence to the pending claims.  
17 Accordingly, the Court denies Norfolk Southern's motion for a  
18 blanket exclusion order for such evidence. Of course, the  
19 admissibility of testimony and any individual items of  
20 evidence remains to be addressed at trial.

21 Finally, if Norfolk Southern seeks a limiting  
22 instruction concerning the proper use of any evidence about  
23 the establishment of a switch rate, it should include a  
24 proposed instruction as part of its proposed jury  
25 instructions.